IN THE

Supreme Court of the United States

October Term, 1976

File No. 76-827

JOHN GREGORY LAMBROS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JOHN GREGORY LAMBROS,
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vs.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, John Gregory Lambros, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 16, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, unreported as yet, appears in the Appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Trial Court's failure to observe the mandate of Federal Rules of Criminal Procedure, Rule 11, 18 U.S.C., requiring that the Trial Court personally address the petitioner in determining that his plea of guilty has been knowingly and voluntarily entered into, necessitates the granting of petitioner's motion to withdraw his plea of guilty.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Federal Rules of Criminal Procedure, Rule 11, Pleas, Subdivisions (c) and (d)

"(c) *Advice to Defendant.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) *Insuring That the Plea is Voluntary.* The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney."

STATEMENT OF THE CASE

Petitioner was indicted for various violations of the Federal Narcotics Act and for assault of federal officers with a deadly weapon. Following pretrial motions and approxi-

mately three days of trial, petitioner entered a plea of guilty to one count charging possession of cocaine with intent to distribute and to one count charging assault of federal officers.

On April 22, 1976, when petitioner made his plea of guilty to the narcotics charge, the Assistant United States Attorney made a short statement of the negotiations to the Court. The Court then asked the petitioner if he wanted to plead guilty to the narcotics charge and the assault charge. The petitioner replied in the affirmative at which point the Court asked the Assistant United States Attorney to question the petitioner for him.

The Assistant United States Attorney proceeded to inform and inquire of the petitioner regarding the appropriate constitutional rights and waivers and the maximum possible penalty, all of which Rule 11(c) requires the Court to ask. The Assistant United States Attorney also inquired of the petitioner whether this plea was voluntary and not a product of force, threats, coercion, or promises apart from the plea agreement which Rule 11(d) requires the Court to ask.

The Court's inquiry relating to the guilty plea on the narcotics charge other than mentioned above, is set forth herein in full as follows:

"The Court: Did you give true answers?

Defendant Lambros: Yes, Your Honor, I did.

The Court: To all these questions, they were all truthful?

Defendant Lambros: Yes, sir.

The Court: Do you want to plead guilty to this count?

Defendant Lambros: Yes, Your Honor, I do.

The Court: You are guilty?

Defendant Lambros: Yes, Your Honor, I am.

The Court: Do you have any questions you want to ask about it?

Defendant Lambros: No. Your Honor.

The Court: You fully understand everything that is going on?

Defendant Lambros: Yes, Your Honor.

The Court: Have you had enough time to visit with your lawyer about pleading guilty to this count?

Defendant Lambros: Yes, I have, Your Honor.

The Court: Then I will accept the guilty plea as to Count 43 with the understanding that I will read the probation report, and if I think the limitation of time that you have negotiated is appropriate I will accept it, and you have negotiated for a maximum of five years plus a special parole term of unlimited duration; and it's also understood, I understand, that you plead guilty to the assault count, the assault indictment in 3-76-17.

It's also understood that the United States Attorney will not prosecute your wife for some possible offense and that there will be no other drug-related prosecutions on behalf of the government. Is that the full understanding that you have?

Defendant Lambros: Yes.

The Court: As I stated it?

Defendant Lambros: Yes, Your Honor." (T. 11-13).

The petitioner's plea of guilty to the second charge of assault on a federal officer was not attended by any further discussion concerning the previously set forth plea negotiation or questioning about that topic by any of the principals concerned. The Trial Court did not personally ask the petitioner any questions about this plea.

Subsequent to the entry of these guilty pleas, defendant

was arrested for distribution of heroin in violation of 21 U.S.C. §841. Prior to sentencing on the original charges, petitioner moved to withdraw the pleas of guilty. The motion was denied and petitioner was sentenced to periods of 10 and 5 years, to run concurrently.

Petitioner appealed from the final judgment convicting him on his pleas of guilty, the resulting sentence, and the denial of his motion for leave to withdraw the guilty pleas. The Eighth Circuit affirmed the denial of Petitioner's motion to withdraw his guilty pleas on the basis that there had been substantial compliance with Rule 11. See pages 7-8 of the Opinion, reprinted in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL WHICH HAVE HELD THAT RULE 11 REQUIRES THAT THE TRIAL COURT PERSONALLY ADDRESS THE DEFENDANT IN ACCEPTING HIS PLEA.

The opinion by the Court of Appeals for the Eighth Circuit in this case effectively allows the prosecuting attorney to assume the role of personal interrogator in the acceptance of guilty pleas, notwithstanding the fact that Congress explicitly delegated this role to the Trial Court in Federal Rules of Criminal Procedure Rule 11, 18 U.S.C. (hereinafter Rule 11). In the Eighth Circuit, under the opinion in this case, the Trial Court can fulfill the duties imposed on him by Rule 11 by merely being present in the courtroom while the prosecuting attorney questions the defendant as to the items prescribed by Rule 11.

In direct conflict with the Eighth Circuit's view of the personal role of the Trial Court under Rule 11 are the views of the Fifth Circuit and the Sixth Circuit.

The Fifth Circuit faced the exact question presented to the Eighth Circuit by this case in *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976). *United States v. Crook, supra*, involved the acceptance of a plea in which the prosecuting attorney made the inquiries of the defendant required by Rule 11 in the presence of the Trial Court. The Fifth Circuit held that such a procedure did not comport with the Rule 11 requirements of personal interrogation of the defendant by the Trial Court and that the conviction must be reversed and defendant allowed to plead anew. The Fifth Circuit cites as a basis for its holding the unequivocal language of Rule 11, the strict construction of that language in *McCarthy v. United States*, 394 U.S. 459, (1969), and *United States v. Vera*, 514 F.2d 102 (5th Cir. 1975), in which the Fifth Circuit held that the assurances of defense counsel that the defendant understands the nature of the charge is no substitute for the personal inquiry required of the Court by Rule 11.

The Fifth Circuit reiterated its strict construction of Rule 11 in *United States v. Narisi*, 538 F.2d 1213 (5th Cir. 1976), in which it reversed a conviction based on a guilty plea where the court did not personally address the defendant pursuant to Rule 11(c) regarding the waiver of constitutionally protected rights which would result from a plea of guilty.

The Sixth Circuit also strictly construes the language of Rule 11. *Phillips v. United States*, 519 F.2d 483 (6th Cir. 1975) held that statements by defense counsel that the defendant had been advised of his rights and that it was defendant's desire to enter a guilty plea did not satisfy the specific requirement of Rule 11 that the Court personally

address the defendant. The Sixth Circuit stated that the 1966 amendment to Rule 11 "made it the *personal* duty of the trial judge" (emphasis original) to question the defendant.

The Fifth Circuit in *United States v. Crook, supra,* and *United States v. Narisi, supra,* has implicitly adopted a standard of meticulous compliance with Rule 11 insofar as the participation of the Trial Court in the inquiry of the defendant.

In accord with this view is *United States v. Aleman,* 417 F.Supp. 117 (S.D. Tex. 1976), which states that it is applying a standard of "meticulous adherence" to the procedures dictated by Rule 11.

The Sixth Circuit in *Phillips v. United States, supra,* interprets *McCarthy v. United States, supra,* to require a standard of "strict compliance" with the requirements of Rule 11.

See also *United States v. Boone,* — F.2d —, 20 Cr. L. 2222 (4th Cir. Nov. 8, 1976), which seems to join the Fifth and Sixth Circuits in holding that Rule 11 is to be applied "strictly" and not "substantially".

United States v. Zampitella, 416 F.Supp. 604 (E.D. Pa. 1976) held that *McCarthy v. United States, supra,* requires that the Court "scrupulously comply" with Rule 11 and allowed withdrawal of a guilty plea where the Court failed to ascertain whether the defendant understood the nature of the charges against her and failed to establish a factual basis for the plea. The Appendix to that case indicates a far more searching personal inquiry by the Trial Court than appears on the record in the trial transcript below.

The Eighth Circuit in its opinion below states it is using a standard of "substantial compliance".

This Court should resolve the conflicting views of the Courts of Appeals on this important issue by granting a Writ of Certiorari to review the decision below.

II.

THE TRIAL COURT FAILED TO PERSONALLY ADDRESS THE PETITIONER IN ACCEPTING HIS PLEA IN VIOLATON OF FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 11, 18 U.S.C., AND *McCARTHY V. UNITED STATES,* 394 U.S. 459 (1969).

Rule 11 requires that the Trial Court personally address the petitioner to inform him of, and determine that he understands, the nature of the charge to which the plea is offered, the minimum and maximum penalties involved, the right to be represented by an attorney, the right of a jury trial, the right to confront witnesses, the right not to be compelled to incriminate himself, that a plea of guilty results in the waiver of the right to trial and that false answers to any questions the Court asks him may result in prosecution for perjury. Rule 11 further requires that the Court, by addressing the petitioner personally in open Court, determine that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement.

The Trial Court below failed to discharge his responsibilities under this Rule. With respect to the narcotics charge, the prosecuting attorney interrogated the petitioner on the Rule 11 considerations. The Trial Court then simply asked the petitioner if he was truthful, if he wanted to plead guilty to this count, if the petitioner had any questions, if he understood what was going on, and if he had enough time to visit with his lawyer. With respect to the assault charge, the Trial Court's personal inquiry was even more deficient because he virtually failed to personally address the petitioner regarding this count at all.

McCarthy v. United States, 394 U.S. 459 (1969), involved a District Court Judge accepting a defendant's guilty plea without first personally addressing the defendant to determine whether the plea was voluntary and knowing. This Court held that the requirement of Rule 11 that the Court personally address the defendant could not be circumvented by the Court relying on other factors to determine if the plea had knowingly and voluntarily been entered into. Rather, in every case the Trial Court must personally address the defendant to make such a determination. Failure to do so requires that the defendant be allowed to plead anew. This Court in *McCarthy v. United States, supra,* concluded that:

> "[P]rejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendant to years of imprisonment, District Judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking." (394 U.S. at 471.)

The Trial Court's failure to personally address the defendant and the Court of Appeals' decision below fail to

apply the holding of *McCarthy v. United States, supra.* For this reason, the petition for a writ of certiorari should be granted.

III.

THE TRIAL COURT'S FAILURE TO PERSONALLY ADDRESS THE PETITIONER WAS SO FAR A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THE DECISION OF THE COURT OF APPEALS SO FAR SANCTIONED SUCH A DEPARTURE BY THE TRIAL COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Prior to 1966 there was no requirement that the Trial Court personally address the defendant. However, in 1966 this Court and Congress determined to make it an affirmative requirement by amendment to Federal Rules of Criminal Procedure, Rule 11(c), 18 U.S.C. In 1974 Rule 11 was further amended but the requirement that the Court personally address the defendant was kept with regard to Rule 11(c), and added to Rule 11(d).

This Court in *McCarthy v. United States, supra,* noted the significance of these amendments:

> The draftsmen amended [Rule 11] to add a provision "expressly requiring the Court to address the defendant personally." This clarification of the judge's responsibilities quite obviously furthers both of the rule's purposes. By personally interrogating the defendant, not only will the judge be better able to ascertain the pleas voluntariness, but he also will develop a more complete record to support his determination in a subsequent post conviction attack." (394 U.S. at 466).

The Petitioner was interrogated with respect to the Rule 11 requirements almost entirely by the United States Attorney whose function was to prosecute Petitioner and act as agent of the government in the plea bargaining negotiations. The United States Attorney in this situation neither possesses sufficient neutrality to properly interrogate criminal defendants with respect to the waiver of their constitutional rights and the knowingness and voluntariness of their plea, nor the requisite authority to perform such a function. Rather, Rule 11 requires that the Court personally address and interrogate the defendant with respect to each of the items enumerated therein.

One of the objectives of Rule 11 is to prevent the entry of guilty pleas without the defendant possessing a complete understanding of the nature and consequences of such a plea. This Court and Congress have determined that in order to achieve this objective the Trial Court must personally question the defendant with regard to the knowingness and voluntariness of the plea which he has made. As held in *United States v. Crook, supra*:

> "Allowing the prosecutor to make the required inquiries of the defendant results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11." (526 F.2d at 710.)

The Trial Court below departed from the accepted and usual course of judicial proceedings, and the Court of Appeals for the Eighth Circuit in its Opinion below sanctioned such a departure, when Rule 11 was construed to permit the prosecutor to interrogate the petitioner with respect to the knowingness and voluntariness of a negotiated plea. This departure from the accepted and usual course

of judicial proceedings imperils the administration of criminal justice to such an extent as to call for an exercise of this Court's power of supervision. See *McCarthy v. United States*, 394 U.S. at 464.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Dated:

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For The Eighth Circuit

No. 76-1580

No. 76-1581

United States of America,

Appellee,

vs.

John Gregory Lambros,

Appellant.

Appeal from the United States District Court
for the District of Minnesota

Submitted: October 15, 1976

Filed: November 16, 1976

Before VAN OOSTERHOUT, Senior Circuit Judge, HEANEY and BRIGHT, Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

This is an appeal by defendant Lambros from final judgment convicting him on pleas of guilty on the charges

hereinafter described, the resulting sentence, and the denial of his motion for leave to withdraw guilty pleas made by him.

No. 76-1580 is the prosecution based on a multiple count indictment against the defendant and numerous other persons charging an extensive conspiracy to import cocaine and distribute it in Minnesota. Lambros entered a plea of guilty to Count 43 charging possession of two pounds of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a) (1).

No. 76-1581 is an indictment charging assault with a deadly weapon upon United States Marshals at the time of defendant's arrest on the drug charge.

On April 22, 1976, after three days of trial of multiple defendants before a jury in case No. 76-1580, and after other defendants at the trial had entered guilty pleas, the record reflects the following proceedings:

Mr. Walbran: [Assistant United States Attorney.] Your honor, on yesterday morning, on this, our fourth day of trial, and what would be our third day of evidence taken in the cocaine conspiracy case 3-75-128, we have arrived at a satisfactory disposition of the case. It is the intention of the defendant John T. Lambros to enter a change of plea in the case number 128 as to Count 43 of the indictment. That would be a tender of a negotiated plea, Your Honor, under which the defendant would receive no more than five years incarceration and a special parole term of whatever length the Court determines, but at least three years.

Your Honor, the defendant as part of the negotiation will also this morning tender to the Court a

change of plea to Count I of that other indictment in 3-76-17 pertaining to an assault and resistance against certain Deputy U. S. Marshals and narcotics officers. That is a non-negotiated plea. That is, the offense carries a maximum penalty of ten years and $10,000 and Mr. Lambros will simply enter a plea of guilty.

It is our understanding and our negotiation that the two sentences to be imposed would be served concurrently. It is further our assurance, Mr. Lambros, that we will not pursue any cocaine-related charges against his wife Christina. This is a matter which concerns him and we are satisfied the ends of justice have already been served in her case.

It is also part of the negotiations that the United States Attorney will not pursue a potential or latent charge arising from Mr. Lambros' possession of three electronics devices which seem to be bugging devices and which the FBI has been investigating for us. We will not pursue those charges now.

Have I correctly stated the negotiations, Mr. Thompson?

Mr. Thompson: [Defendant's attorney.] Yes.

Mr. Walbran: Mr. Lambros, have I correctly stated it?

Defendant Lambros: Yes, you have.

Mr. Walbran: Do you understand it?

Defendant Lambros: Yes, I do.

The Court: You want to plead guilty to Count 43 in the major 128 case and you want to plead guilty to the indictment in 3-76-17?

Defendant Lambros: Yes, Your Honor.

Thereafter the prosecuting attorney, at the court's request and in the presence of the defendant and his attorney, explained defendant's constitutional rights in detail and the penalties involved in the pending charges, and questioned defendant with respect to his knowledge and understanding of such rights, and the voluntariness of his guilty pleas. Thereafter the court personally addressed and interrogated the defendant as follows:

The Court: Did you give true answers?

Defendant Lambros: Yes, Your Honor, I did.

The Court: To all these questions, they were all truthful?

Defendant Lambros: Yes, sir.

The Court: Do you want to plead guilty to this count?

Defendant Lambros: Yes, Your Honor, I do.

The Court: You are guilty?

Defendant Lambros: Yes, Your Honor, I am.

The Court: Do you have any questions you want to ask about it?

Defendant Lambros: No, Your Honor.

The Court: You fully understand everything that is going on?

Defendant Lambros: Yes, Your Honor.

The Court: Have you had enough time to visit with your lawyer about pleading guilty to this count?

Defendant Lambros: Yes, I have, Your Honor.

The Court: Then I will accept the guilty plea as to Count 43 with the understanding that I will read the probation report, and if I think the limitation of time that you have negotiated is appropriate I will accept it, and you have negotiated for a maximum of

five years plus a special parole term of unlimited duration; and it's also understood, I understand, that you plead guilty to the assault count, the assault indictment in 3-76-17.

It's also understood that the United States Attorney will not prosecute your wife for some possible offense and that there will be no other drug-related prosecutions on behalf of the government. Is that the full understanding that you have?

Defendant Lambros: Yes.

Defendant's constitutional rights and the consequences of his guilty plea were also explained in connection with the assault charge. The question of accepting the defendant's guilty plea on the assault charge was taken up immediately following the Rule 11 hearing on the drug charge.

Time for sentencing was fixed for June 21, 1976. On the morning of that day and before sentencing, defendant filed a motion for leave to withdraw his guilty plea in each of the two cases based upon two grounds, to wit: (1) Defendant's arrest on June 17, 1976, on a new drug charge materially changed defendant's position and violated the express and implied terms of the plea bargain and nullified the plea bargain agreement. (2) While defendant was advised as to certain consequences of his guilty plea in accordance with Rule 11(c), he was not apprised that the consequence could also expose him to substantially longer terms of imprisonment for subsequent convictions under the Federal Narcotics Act.

The court denied the motion and subsequently, on July 29, filed a memorandum explaining its reasons for so doing.

On June 21, 1976, Lambros was sentenced to ten years imprisonment on the assault charge and to a concurrent sentence of five years on the drug charge, plus a fine of $10,000, and a three-year special parole term. Immediately thereafter, on motion of the United States Attorney, all other counts of the indictment were dismissed. We find nothing in the record which reflects in any way a failure of the Government to carry out its plea bargain obligation with respect to not prosecuting defendant's wife, or in any other respect.

Defendant seeks a reversal upon the broad ground, supported by various contentions hereinafter set out and discussed, that the court abused its discretion in denying his presentence motion for leave to withdraw his plea of guilty, We find no abuse of discretion and affirm the conviction.

The standard for review of motions to withdraw a guilty plea before sentence is somewhat more lenient than that applying to such motions filed after sentencing.

Presentence motions are to be judged on a "fair and just" standard. *United States v. Bradin,* 535 F.2d 1039, 1040 (8th Cir. 1976). A good discussion of the fair and just standard is found in *United States v. Barker,* 514 F.2d 208, 220-222 (D.C. Cir. 1975). In *United States v. Benson,* 469 F.2d 222, 223 (8th Cir. 1972), we stated:

> In United States v. Foosley, 440 F.2d 1280 at 1281 (CA8 1971) we said: "Rule 11 proceedings are not an exercise in futility. The plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of the same." We are abundantly satisfied that the trial court's denial of appellant's motion to withdraw his plea of guilty was not

> an abuse of discretion. United States v. Rawlins, 440 F.2d 1043, 1045-1046 (CA8 1971).

Defendant's contention that the Government breached its plea bargain agreement is wholly without merit. Defendant's June 17 arrest, which occurred nearly two months after his guilty plea, is based on a drug offense alleged to have been committed on June 17, 1976. There is no support for defendant's claim that an investigation of defendant for narcotics offenses was in operation at the time of the guilty plea or that the Government had any knowledge at the time of the guilty plea that the defendant was continuing to operate an illegal drug business.

Defendant also challenges the sufficiency of the court's personal participation in the Rule 11 proceedings. He concedes that appropriate questions and information were sought by the Government attorney and points to no way in which he was misled or prejudiced by the Rule 11 proceedings. Before accepting the guilty plea, the court by personal, direct inquiries, heretofore set out in detail, ascertained that the defendant's responses to the Government attorney's questions were truthful, that he fully understood his rights and the consequences of his plea, that he had no question to ask, that he admitted that he had committed the acts charged and that he was guilty of the offenses charged, and that he had a full opportunity to consult with his attorney with respect to his plea.

Defendant was an intelligent person and was represented by competent, self-employed counsel.

The court by its personal questioning on a sound basis in effect adopted the extensive record made by the prosecuting attorney. We hold that there has been substantial

compliance with Rule 11, reserving for the moment the issue next discussed.

Defendant further contends that under certain circumstances punishment for a subsequent violation of the Federal Narcotics Act can be enhanced by reason of his prior conviction under the narcotics act, and that he was entitled to be informed of such consequences, and that he was not so informed. The trial court in its opinion held that such was a collateral consequence and not a direct consequence, and in support thereof, stated:

> The cases cited by defendant do indicate that a defendant must be informed of certain legal consequences of his plea. Courts have used the label "direct" consequences to denote those which must be communicated and the label "collateral" consequences for those which need not. In *Weinstein v. United States*, 325 F.Supp. 597, 600 (C.D. Calif. 1971), a case presenting a similar claim of involuntariness, the court stated:
>
> > Rather petitioner would have us hold that he must be told of all possible collateral consequences which might ensue from a plea of guilty or from a conviction, since the results collaterally in the future are the same. No authority is cited to support him.

It is true that the present sentence he is serving on a narcotics charge was enhanced because of this 1955 narcotics conviction on his plea of guilty, but we know of no ruling in this or any other Circuit that he should have been advised of this possibility before entering the original plea. We agree with the

holding in *Fee v. United States*, 207 F. Supp. 674, 676 (W.D. Va. 1962):

> To the best of my knowledge it has never been suggested that the court . . . is under any duty to warn of such a possible result. [They] have a right to assume that the defendant will not be guilty of a subsequent offense . . .

In *Cuthrell v. Director*, 475 F.2d 1364, 1366 (4th Cir. 1973), the court states and holds:

> The law is clear that a valid plea of guilty requires that the defendant be made aware of all "the direct consequences of his plea." . . . By the same token, it is equally well settled that, before pleading, the defendant need not be advised of all collateral consequences of his plea, or, as one Court has phrased it, of all "possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty, * * *." . . .
>
> The distinction between "direct" and "collateral" consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment. [Citations omitted.]

The trial court stated that it was not taking the subsequent charge into consideration in imposing sentence.

We agree that the possibility of enhanced punishment in a subsequent narcotics act violation is a collateral and not a direct consequence of the guilty plea, and hence that the court in the Rule 11 proceedings is not obligated to explain the collateral consequence.

In support of its exercise of discretion in denying the motion to withdraw the guilty plea, the court stated:

> Defendant admits that an established ground for refusing to allow plea withdrawal is the possibility of prejudice to the government. The defendant was part of a widespread drug distribution scheme. Many of the key witnesses were co-conspirators who wished to lessen their sentences. They have now pleaded guilty, been sentenced, and transferred to prison. The expense of assembling them for trial would be great and, more importantly, the incentive for them to testify with the possibility of sentence reduction foreclosed is small. When this prejudice is weighed against defendant's motivation for withdrawal, the merit of the motion is insubstantial. Defendant does not contend that he is innocent or that he has unearthed a valid defense. Rather he simply wants to put all of his criminal offenses in one basket. He can only do this at a great cost to the government. Therefore, withdrawal will not be allowed.

The record in the present case fully supports the trial court's determination. The record shows that three days of the prosecutor's time, the time of the witnesses, and the time of the court was consumed in the jury trial before the guilty plea was entered, and that considerable difficulty would be involved in assembling the many witnesses used by the Government in the multiple conspiracy charges, and in refreshing the recollections, and in obtaining many witnesses incarcerated in penal institutions.

We are convinced that the court did not abuse its discretion in denying leave to the defendant to withdraw his guilty plea to the two charges here involved.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

No. 76-827

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN GREGORY LAMBROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 544 F. 2d 962.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1976. The petition for a writ of certiorari was filed on December 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court complied with Rule 11 of the Federal Rules of Criminal Procedure in accepting petitioner's plea of guilty.

STATEMENT

An indictment returned in February 1976 in the United States District Court for the District of Minnesota charged petitioner and several other persons with conspiracy to import and distribute cocaine and with a number of substantive narcotics offenses. On April 22, 1976, after three days of trial before a jury, petitioner offered to plead guilty to one substantive count of the indictment (possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1)) as well as to one count of another indictment, which charged him with assaulting United States Marshals with a deadly weapon at the time of his arrest on the drug charges, in violation of 18 U.S.C. 111 and 1114. The guilty pleas were offered pursuant to an agreement whereby petitioner would receive no more than five years' imprisonment on the drug offense, the sentence on the assault offense would be served concurrently, the remaining charges against petitioner would be dismissed, and certain cocaine-related charges would not be brought against petitioner's wife (Pet. App. A-2 to A-3).

Following a specific request by the district judge (Tr. 3),[1] the Assistant United States Attorney conducted an inquiry in court into the voluntariness of petitioner's guilty pleas and into petitioner's understanding of the consequences of the pleas. After government counsel had set forth the terms of the plea bargain and obtained the assent of petitioner and his counsel to its terms, petitioner admitted that he had committed the narcotics offense as alleged in Count 43 of the indictment (Tr. 3-5). The Assistant United States Attorney then advised

[1] "Tr." refers to the transcript of the guilty plea proceedings held on April 22, 1976.

petitioner that by pleading guilty he would waive certain constitutional rights, including trial by jury, the requirement that the government prove his guilt beyond a reasonable doubt and that the jury's verdict be unanimous, the right to summon and cross-examine witnesses, and the privilege against self-incrimination (Tr. 6-7). Petitioner was also informed of the maximum penalties that the court could impose and of the significant features of a special parole term (Tr. 9-10).

Finally, petitioner acknowledged that he had had ample opportunity to consult with his attorney about the details of the charges and that he was satisfied with his services (Tr. 5-6) and stated that he had not been threatened into pleading guilty, that there were no promises, secret understandings or beliefs as to sentencing, other than those appearing on the record, that he was entering the plea freely and with "a clear mind," and that he understood the consequences of his plea, but that he nevertheless desired to plead guilty because he was guilty of the offense charged (Tr. 5, 7, 10, 11). Petitioner's retained counsel agreed that petitioner was an intelligent individual, that he was pleading with "a clear mind," and that his answers to the inquiries at the Rule 11 proceeding "would stand" (Tr. 9-11).

After government counsel had completed the questioning the following colloquy ensued between the court and petitioner (Tr. 11-12):

> The Court: Did you give true answers?
>
> Defendant Lambros: Yes, Your Honor, I did.
>
> The Court: To all these questions, they were all truthful?
>
> Defendant Lambros: Yes, sir.

The Court: Do you want to plead guilty to this count?

Defendant Lambros: Yes, Your Honor, I do.

The Court: You are guilty?

Defendant Lambros: Yes, Your Honor, I am.

The Court: Do you have any questions you want to ask about it?

Defendant Lambros: No, Your Honor.

The Court: You fully understand everything that is going on?

Defendant Lambros: Yes, Your Honor.

The Court: Have you had enough time to visit with your lawyer about pleading guilty to this count?

Defendant Lambros: Yes, I have, Your Honor.

The Court: Then I will accept the guilty plea as to Count 43 with the understanding that I will read the probation report, and if I think the limitation of time that you have negotiated is appropriate I will accept it, and you have negotiated for a maximum of five years plus a special parole term of unlimited duration; and it's also understood, I understand, that you plead guilty to the assault count, the assault indictment in 3-76-17.

It's also understood that the United States Attorney will not prosecute your wife for some possible offense and that there will be no other drug-related prosecutions on behalf of the government. Is that the full understanding that you have?

Defendant Lambros: Yes.

Immediately following this inquiry, the Assistant United States Attorney, again pursuant to the court's direction, questioned petitioner on his plea to the assault charge (Tr. 15-20). Petitioner's counsel also participated in the inquiry and expressed his satisfaction with both pleas (Tr. 20-21). The district court then accepted petitioner's plea of guilty to the assault (Tr. 21).

On June 21, 1976, immediately prior to sentencing, petitioner moved to withdraw the guilty pleas, contending that his arrest on heroin charges four days earlier had violated the plea bargain and that he had not been informed at the time he pleaded guilty of the possibility of an enhanced sentence if he were to be convicted for a second narcotics offense (Pet. App. A-5). The district court denied the motion, finding that the pleas had been voluntary and that petitioner had been advised of all of the direct consequences of the pleas.[2]

Petitioner was then sentenced to ten years' imprisonment on the assault charge, to run concurrently with a five-year prison sentence on the narcotics offense. In addition, the court imposed a three-year special parole term and a fine of $10,000 for the narcotics offense. On appeal, petitioner asserted for the first time that he must be given the opportunity to plead anew because government counsel, rather than the district court, had conducted most of the inquiry required by Rule 11 of the Federal Rules of Criminal Procedure. The court of appeals affirmed, rejecting petitioner's attack upon the adequacy of the Rule 11 proceedings (Pet. App. A-1 to A-11).

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[2]The district court also noted that withdrawal of the pleas would not be fair and just, since petitioner had not asserted his innocence and the government would be prejudiced by a plea withdrawal.

ARGUMENT

Petitioner does not allege that his guilty pleas were involuntary, nor that any of the necessary inquiries prescribed by Rule 11 of the Federal Rules of Criminal Procedure to ensure the validity of a plea of guilty were disregarded. Indeed, as the court of appeals noted (Pet. App. A-7), petitioner "points to no way in which he was misled or prejudiced by the Rule 11 proceedings." Rather, petitioner's sole contention is that he must be allowed to withdraw his guilty pleas and to plead anew because most of the questioning during the Rule 11 proceedings was conducted by government counsel, at the district court's direction, rather than by the court itself. The court of appeals correctly rejected this claim (Pet. App. A-7):

> Before accepting the guilty plea, the court by personal, direct inquiries * * * ascertained that the defendant's responses to the Government attorney's questions were truthful, that he fully understood his rights and the consequences of his plea, that he had no question to ask, that he admitted that he had committed the acts charged and that he was guilty of the offenses charged, and that he had a full opportunity to consult with his attorney with respect to his plea.
>
> Defendant was an intelligent person and was represented by competent, self-employed counsel.
>
> The court by its personal questioning on a sound basis in effect adopted the extensive record made by the prosecuting attorney.* * *

Relying on *McCarthy* v. *United States*, 394 U.S. 459, however, petitioner asserts that Rule 11 is satisfied only when the district judge himself conducts the guilty plea

inquiry. This is incorrect. In *McCarthy* this Court held that a defendant whose guilty plea had been accepted pursuant to a seriously defective Rule 11 proceeding must be permitted to withdraw his plea. The Court noted that "noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate * * * plea" (*id.* at 471-472), and it refused to assume from a silent record that the defendant had entered his plea "with a complete understanding of the charge against him" (*id.* at 464).

McCarthy was therefore concerned with the necessity of requiring the defendant to respond personally and affirmatively to inquiries, so that a record would be created that would enable the trial judge "to ascertain the plea's voluntariness [and] * * * to support his determination in a subsequent post-conviction attack." *Id.* at 466. See *Brady* v. *United States*, 397 U.S. 742, 748-749; *Boykin* v. *Alabama*, 395 U.S. 238, 243 and n. 5; *Halliday* v. *United States*, 394 U.S. 831, 832. However, the Court expressly declined to establish a ritual for district courts to follow during a Rule 11 proceeding, recognizing that the nature of the inquiry must necessarily vary from case to case and that "[m]atters of reality, and not mere ritual, should be controlling." *McCarthy* v. *United States, supra*, 394 U.S. at 467-468, n. 20, quoting from *Kennedy* v. *United States*, 397 F. 2d 16, 17 (C.A. 6).

Thus, "the error that was fatal in *McCarthy* was not that the court had not posed the relevant questions, but that the record did not show that they had been posed at all." *Davis* v. *United States*, 470 F. 2d 1128, 1131 (C.A. 3). Here, however, the record of the guilty plea proceedings demonstrates that all the pertinent inquiries required by Rule 11 were made of petitioner. We submit that nothing

in Rule 11 prohibits such questioning of a defendant by the prosecutor, either in whole or in part, in the presence of the defendant's counsel and the court. See *United States* v. *O'Donnell*, 539 F. 2d 1233 (C.A. 9), certiorari denied, No. 76-234, November 15, 1976; *United States* v. *Yazbeck*, 524 F. 2d 641, 643 (C.A. 1); *Davis* v. *United States*, *supra*, 470 F. 2d at 1130-1132; *United States* v. *Benson*, 469 F. 2d 222 (C.A. 8). Although the Rule provides that "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform him of, and determine that he understands," the nature of the charge and the consequences of his plea, the crucial factor is not that the court itself ask the questions of the defendant, but that "the record leave no doubt that the defendant heard and understood what was said." *United States* v. *Yazbeck*, *supra*, 524 F. 2d at 643.

This position is supported by the Advisory Committee Notes to the 1966 Amendment of Rule 11, when the Rule was revised to contain the provision requiring the court to address "the defendant personally." In discussing this amendment the Advisory Committee remarked:

> The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare United States v. Diggs, 304 F. 2d 929 (6th Cir. 1962); Domenica v. United States, 292 F. 2d 483 (1st Cir. 1961); Gundlach v. United States, 262 F. 2d 72 (4th Cir. 1958), cert. den., 360 U.S. 904 (1959); and Julian v. United States, 236 F. 2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better

> practice even when he is represented by counsel, with Meeks v. United States, 298 F. 2d 204 (5th Cir. 1962); Nunley v. United States, 294 F. 2d 579 (10th Cir. 1961), cert. den., 368 U.S. 991 (1962); and United States v. von der Heide, 169 F. Supp. 560 (D.D.C. 1959).

Rule 11, Advisory Committee's Note, Proposed Rules of Criminal Procedure, 39 F.R.D. 171.

The revision was designed to eliminate the practice of accepting guilty pleas in reliance upon assurances by the defendant's counsel or on other assumptions not appearing in the record, rather than to mandate that the defendant be questioned only by the court. See *Phillips* v. *United States*, 519 F. 2d 483, 485 (C.A. 6); *Otero-Rivera* v. *United States*, 494 F. 2d 900, 903-904 (C.A. 1).[3] See also *Davis* v. *United States*, *supra*, 470 F. 2d at 1130-1131:

> The word "personally" in the amendment to the rule follows and therefore would appear to modify "defendant," not "court." The change was aimed at preventing a reliance by the court upon a statement or response of the defense attorney rather than the defendant himself to establish voluntariness and understanding of the charge and consequences of the plea. There is no indication that permitting

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[3]Although petitioner claims that *Phillips* v. *United States*, *supra*, conflicts with the present case, *Phillips* did not concern the issue whether a defendant's responses to inquiries by the prosecutor, rather than by the court, violates Rule 11. Instead, it involved a guilty plea proceeding in which the defendant had not been addressed personally by either the court or the prosecutor concerning the waiver of his constitutional rights and in which the court had improperly relied on assurances from defense counsel in determining that the plea was valid.

> counsel for either the Government or the defendant to address appropriate questions to the defendant was an evil at which the amendment was aimed, and we do not perceive evil in such procedures.* * *

As petitioner notes (Pet. 7), the Fifth Circuit has reached a contrary result in *United States* v. *Crook*, 526 F. 2d 708, a result that, for reasons we have already stated, we believe to be premised on an unnecessarily technical reading of Rule 11 that is supported neither by *McCarthy* v. *United States, supra,* nor by the history of the Rule.[4] In any event, we do not believe that it is necessary for this Court to resolve the conflict at this time. Not only does the Fifth Circuit stand alone in insisting that the district court itself conduct the entire interrogation of a defendant prior to accepting his guilty plea, but also the issue, which has arisen only infrequently, does not appear to be sufficiently important to the administration of the criminal laws to require further review. Moreover, the issue concerns an area of practice in which complete uniformity among the circuits does not appear to be essential.[5]

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[4]In addition, the Fifth Circuit's fear that questioning of a defendant by government counsel will lead to "an atmosphere of subtle coercion" (526 F. 2d at 710) is wholly illusory in the present case. The Assistant United States Attorney questioned petitioner pursuant to the court's express directions, and at no point during the proceedings did petitioner or his counsel voice any objections to this procedure. Indeed, petitioner's counsel participated in the inquiry conducted by the government attorney and remarked that petitioner's responses "would stand" and that petitioner was pleading with a "clear mind" (Tr. 9-11). Moreover, in response to questions by the court, petitioner stated that he had given truthful answers during the inquiry, that his plea was entirely free and voluntary, and that he "fully [understood] everything that [was] going on" (Tr. 11-12).

[5]In other areas involving the acceptance of guilty pleas the Fifth Circuit similarly has imposed more rigorous requirements than other courts of appeals. For example, the court has required that the defendant be questioned under oath during the Rule 11 proceeding. See *Bryan* v. *United States*, 492 F. 2d 775, 781 (C.A. 5), certiorari denied, 419 U.S. 1079.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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